



TEXAS CENTER
FOR THE JUDICIARY

What Judges Can Do to Improve Education Outcomes
Judge Rob Hofmann, Jamie Bernstein, and Ian Spechler
452nd District Court, Children's Commission, Disability Rights Texas
2017 Child Welfare Judges Conference
November 13, Lost Pines



The Top 10 List

 Student Profile	 Special Education	 Decision-Making	 School Stability	 Transitions
 Attendance	 School Discipline	 Dispute Resolution	 Postsecondary	 Collaboration

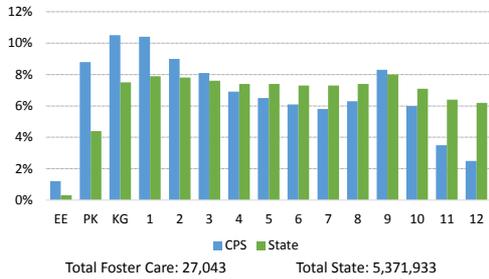


#1

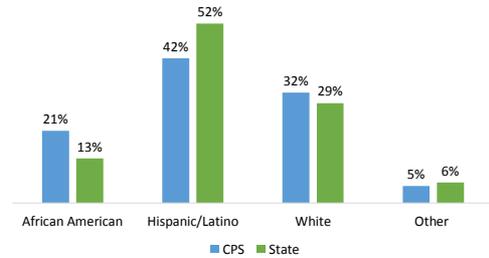
Who Are the Students in Foster Care?



Percentages by Grade 2014-2015



Race/Ethnicity Breakdown 2014-2015



Pre-Kindergarten



- School district must offer free Pre-K if it identifies at least 15 eligible children who are at least 4 years old.
Tex. Educ. Code § 29.153(a-1)
- Child eligible for free Pre-K if child is in or has ever been in conservatorship of DFPS following an Adversary Hearing.
Tex. Educ. Code § 29.153(b)(6)



Nutrition



- Students in foster care categorically eligible for all U.S. Department of Agriculture child nutrition programs, including:
 - National School Lunch and Breakfast Programs,
 - Special Milk Programs,
 - Fresh Fruit and Vegetable Program
 - Summer Food Service Program, and
 - Child and Adult Care Food Program.

42 U.S.C. § 1758



WHAT CAN JUDGES DO?



- YOU, JUDGE are ultimately in charge.
 - YOU, JUDGE make sure someone puts the same amount of effort into the education of each child in foster care, as you have for your own child.
- The law requires that YOU, JUDGE ask about a child's educational needs and goals at every permanency hearings; Do it!! Even for young children.
 - Ask about enrollment in head-start and pre-kindergarten.
 - Ask about developmental milestones and Early Childhood Intervention.
 - Use bench cards to combat disproportionality and disparities (E.g. NCJFCJ Courts Catalyzing Change).

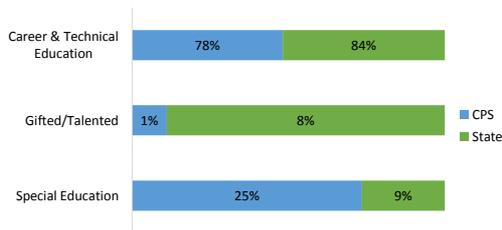


#2

What Procedures Address Special Education?



Participation in Special Programs 2014-15



Note: The percentage of students in foster care receiving special education services decreased 2% over a three year period.



Special Education Law & Purpose



- Sources of Special Education Law:
 - Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et. seq. (34 CFR Part 300)
 - Tex. Educ. Code, Chapter 29 (Special Ed) and Chapter 37 (Discipline)
 - Commissioner of Education's Rules and State Board of Education Rules, 19 Tex. Admin. Code § 89.1001 et. seq.
- To ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

42 U.S.C. § 1400(d)(1)(A)
- To ensure that the rights of children with disabilities and parents of such children are protected.

42 U.S.C. § 1400(d)(1)(B)



504 v. Special Education



- 504 consists of accommodations for students' disabilities, regardless of whether they have an educational need for special education.
- To be eligible a student must have a physical or mental impairment that substantially limits a major life activity.
- There is no funding that comes with 504.
- There is no standard for what a 504 plan looks like, though one must exist.
- 504 teams meet yearly like ARD committees.



Eligibility



- To be eligible, the student must meet the definition of one of several enumerated disabilities and, “by reason thereof,” need special education and related services.

42 U.S.C. § 1401(3)

- These disabilities include:

- Intellectual disability
- Hearing impairments, including deafness
- Speech or language impairments
- Visual impairments, including blindness
- Emotional disturbance
- Orthopedic impairments
- Autism
- Traumatic brain injury
- Other health impairments, such as a terminal or chronic disorder or ADHD
- Specific learning disabilities



Entitlement and FAPE



- IDEA guarantees that all students with disabilities age 3 through 21 have the right to FAPE. 21 means 21 at the beginning of a school year. Thus, 22 year olds can often be served in a district.

- The right to a FAPE ends when a student graduates with a regular high school diploma.

34 C.F.R. § 300.102(a)(3)(i)

- This does not include students who have received a certificate of attendance or a certificate of graduation that is not a regular high school diploma.

34 C.F.R. § 300.102(a)(3)(ii)

- School districts deliver FAPE by providing “special education services” and “related services.” They are required to do so IN ALL SETTINGS including RTCs, hospitals, jails, juvenile facilities, etc.



Services Standards



- Board of Ed. Of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176 (1982)

- The Individualized Education Program (IEP) must confer “meaningful benefit,” which means that it must provide for “significant learning.”
- IEP reasonably calculated to enable the child to benefit.
- NOT a maximization of child’s potential.



Services Standards



- *Endrew F. v. Douglas County Sch. Dist.*, 580 US ____ (2017)
 - To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.
 - Rejected "de minimis" standard.



WHAT CAN JUDGES DO?



- Just like in court, documentation is critical.
 - YOU, JUDGE make sure your advocates understand to make all requests to the school in writing, which triggers timelines.
 - YOU, JUDGE make sure your advocates hold school districts accountable without delays and get refusals in writing. Use your attorneys ad litem for heavy hitting.
 - Make sure that DFPS does its part to provide supporting documents.
- For all children, especially those receiving special education services, at each hearing YOU, JUDGE think about whether their education needs and goals have been identified and addressed.



#3

Who Makes Education-Related Decisions?





Education Decision-Maker



- For all students in DFPS conservatorship.
- Will make day-to-day education decisions. For example:
 - Enrolls child,
 - Arranges extracurricular activities,
 - Attends teacher conferences,
 - Approves field trips, and
 - Determines course selection.
- Accesses school records and accesses/maintains education portfolio.
- Can be CPS staff, but most likely caregiver.
- Notice to court and school within 5 days of Adversary Hearing; updates in permanency progress report.

Tex. Fam. Code § 263.004



DFPS Form 2085-E




Admission, Review, and Dismissal (ARD) Meeting



- For students eligible to receive special education services
- When?
 - Meets at least once a year to develop student's Individual Educational Program (IEP).
 - Parent must receive notice 5+ school days before meeting and school must attempt to work with parent's schedule.
- Who attends?
 - Members of Committee:
 - Parents and Student,
 - Representative of school district knowledgeable about special ed services,
 - 1+ special ed teacher,
 - 1+ regular ed teacher (if student is or may be in regular ed classes), and
 - Someone who can interpret evaluations.



Who is Considered a “Parent” Under IDEA?



- Biological or adoptive parent,
- Foster parent unless prohibited by state law,
- Guardian generally authorized to act as the child’s parent or to make educational decisions for the child,
- Person acting in place of a parent and who the child lives with (can be non-relative),
- Person legally responsible for the child, or
- Surrogate parent: when a child is in hospital/RTC/jail/ juvenile detention.

34 C.F.R. § 300.30(a)



Foster Parents Under Texas Law



- HB 1556 (2017) changed the law.
- A foster parent may act as surrogate parent if DFPS is managing conservator, rights and duties of DFPS to make decisions haven’t been limited by court order, and foster parent agrees to participate in making special education decisions and agrees to complete a surrogate parent training program within 90 days.

Tex. Educ. Code § 29.015(a)



Requirements for Surrogate Parents



- District must make “reasonable efforts” to ensure assignment of a surrogate parent not more than 30 days after the need arises.
- Criteria for selection:
 - NOT a school district employee or any agency involved in care or education of the child (DFPS, TJJD, State Supported Living Center, RTC, etc.).
 - No personal or professional interest that conflicts with the interests of the child.
 - Has knowledge and skills to ensure adequate representation of the child.
- Represents the child in all matters relating to:
 - Identification, evaluation, placement, and
 - Provision of FAPE to the child.

34 C.F.R. § 300.519; Tex. Educ. Code §29.015

- The court having jurisdiction over a foster child may appoint a surrogate parent for a foster child.

34 C.F.R. § 300.519(c); Tex. Fam. Code § 263.0025



Duties of Surrogate Parent Under Texas Law



A surrogate parent must:

- Complete a training program for surrogate parents,
- Visit the child and the child's school,
- Consult with persons involved in the child's education, including teachers, caseworkers, court-appointed volunteers, guardian ad litem, attorney ad litem, foster parents, and caretakers,
- Review the child's educational records,
- Attend the child's ARD committee meetings,
- Exercise independent judgment in pursuing the child's interests, and
- Exercise the child's due process rights under state and federal special education law.

Tex. Educ. Code § 29.001



Why CASA?



Under Texas law, a CASA volunteer may serve as surrogate parent if:

- The child is under the conservatorship of the Department,
- CASA volunteer is the child's guardian ad litem, and
- The foster parent is not acting as the child's parent under Section 29.015 of the Texas Education Code.

Tex. Fam. Code § 107.031

- Opportunity for continuity.
- A volunteer who knows the child.
- Must report to the court.
- Already has a professional relationship with DFPS and the attorney ad litem.



WHAT CAN JUDGES DO?



- YOU, JUDGE have a huge amount of power and authority; use it!
 - You make the decision who the surrogate parent is, especially if the child is in congregate care.
 - YOU, JUDGE Require CASA programs to get training to be surrogate parents.
 - YOU, JUDGE make certain that the surrogate parent goes to every ARD meeting.
- You allow your attorneys ad litem to go and help when they need it.



#4

What is “Educational Best Interest?”



Fostering Connections



- DFPS to keep the child in the same school any time the child’s placement changes.
- If it is not in the child’s best interest to remain in the same school, immediate enrollment in a new school with all records transferred.
- Each DFPS placement decision must consider appropriateness of child’s current school setting and proximity to school.

*Fostering Connections to Success and
Increasing Adoptions Act of 2008*
Public Law 110-351



Every Student Succeeds Act (ESSA)



- Key provisions:
 - Right to remain in school of origin, unless not in child’s best interest,
 - Immediate enrollment/records transfer,
 - Schools and CPS must collaborate to develop clear, written transportation procedures,
 - Designated points of contact, and
 - Student achievement data = school accountability.

Every Student Succeeds Act (2015)
Public Law 114-95



School Stability in Texas



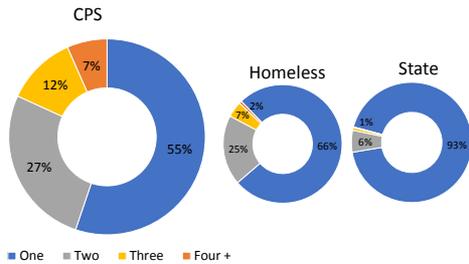
- Child entering care may remain:
 - In the same public school he or she was attending at the time of removal, even if foster placement is outside the district's attendance area,
 - Until completes highest grade at school,
 - Without payment of tuition,
 - Even if child leaves conservatorship.

Tex. Educ. Code § 25.001(g)
- Once in care child may:
 - Continue to attend school enrolled in after came into foster care, regardless of placement changes,
 - Remain until completes highest grade at school,
 - Without payment of tuition,
 - Even if child leaves conservatorship.

Tex. Educ. Code § 25.001(g-1)



Number of Schools Attended 2014-2015



WHAT CAN JUDGES DO?



- At removal and every time a child's placement changes YOU, JUDGE personally review the decision about the child remaining in their school of origin.
 - Ask about the many factors that influence the educational best interest decision.
- Make certain that CPS staff and your advocates know critical education dates and YOU, JUDGE don't move a child unless absolutely necessary during these times (E.g. STAAR testing dates).
- YOU, JUDGE help with transportation alternatives. Be creative!



PEIMS Code



- TEA collects data through PEIMS about students in foster care.

Tex. Educ. Code § 7.029(b-1)

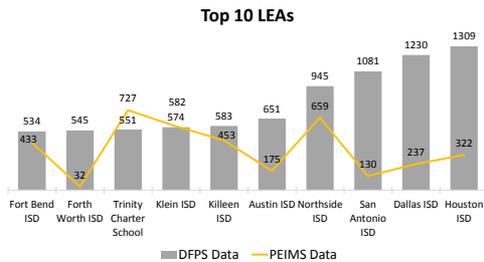
- Will be “coded” yearly as a student in foster care based on Form 2085-E.

- Also coded as “At Risk.” May result in targeted services from school.

Tex. Educ. Code § 29.081(d)



Distribution of Students 2014-2015





WHAT CAN JUDGES DO?



- YOU, JUDGE make your CPS staff do their job:
 - Confirm enrollment in the new school within three days.
 - Confirm withdrawal from the previous school.
 - Confirm that records were transferred within 10 working days; involve attorneys ad litem if not.
 - Update and share Education Portfolios.
- YOU, JUDGE Ensure that your surrogate parent helps with special education transfers and relays information to the new school quickly.
- YOU, JUDGE think about a special extracurricular activity of your child and make sure that information is relayed and transferred to the new school.



#6

Why is Attendance Important?



Excused Absences



- Student in care excused, including travel, if activity:
 - Ordered by court under Texas Family Code Chapters 262 or 263 (if not practicable outside of school hours), or
 - Required under DFPS service plan.
 - Tex. Educ. Code § 25.087(b)(1)(F)
- If excused, must be allowed reasonable time to make up school work.

Tex. Educ. Code § 25.087(d)



Seat Time Rule



- Student in any grade from K-12 may not be given credit or final grade for a class unless student is in attendance for at least 90% of the days the class is offered.
- If more than 75% but less than 90% seat time, may be given credit/final grade ONLY if student completes plan approved by principal.
- Can be petitioned.

Tex. Educ. Code § 25.092



Truancy



- School district required to refer to truancy court if student misses 10 or more days/parts of days, without being excused, within a 6-month period in same school year.

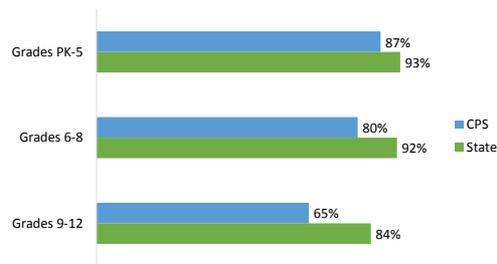
Tex. Educ. Code § 25.0951 (a)

- But, school must offer additional counseling to student and may not refer student to truancy court if school determines that student's truancy is result of being in state foster program.

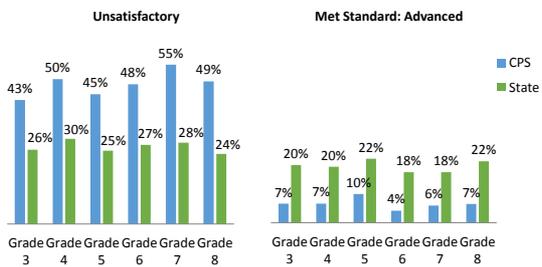
Tex. Educ. Code § 25.0915 (a-3)



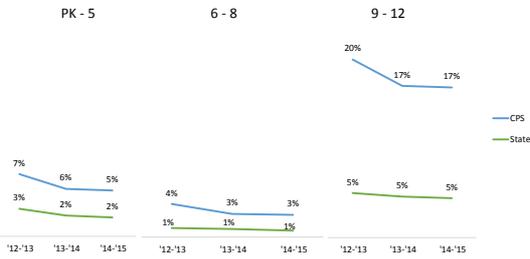
Attendance Record Over 90% 2014-2015



STAAR Reading Results 2015



Percentage of Students Retained Trend 2012-15



Compensatory, Intensive, or Accelerated Instruction



- Students in foster care considered to be at risk of dropping out and are eligible for supplemental education services.
Tex. Educ. Code § 29.081(d)(11)
- School district, as determined by district, must offer intensive program of instruction to any student not likely to receive a high school diploma before the 5th year following the student's enrollment in 9th grade.
Tex. Educ. Code § 28.0213(a)(2)



Award of Credit



- School districts must make credit by examination available, at any point during the school year, to students who are homeless or in foster care.
19 Tex. Admin. Code § 74.24
- School districts must award credit proportionally to a student who is homeless or in substitute care who successfully completes one semester of a two semester course.
19 Tex. Admin. Code § 74.26



WHAT CAN JUDGES DO?



- YOU, JUDGE ensure that DFPS does their best to:
 - Schedule court hearings in consideration of the child's school schedule.
 - Schedule services and visitations outside of school hours.
 - Access tutoring, credit recovery, and/or dropout prevention resources just like you would for your own child.
- Again, YOU, JUDGE require that your CASA programs have thorough education training. There are a lot of great laws to help our kids but our advocates have to know about them.
- And again, authorize and encourage your attorneys at litem to help advocate. YOU, JUDGE hold local training about all these tools.



#7

How Does Behavior Manifest at School?



“Zero Tolerance” is Not the Law in Texas Anymore



- In all disciplinary removals, schools “consider” the following:
 - Self-defense,
 - Intent or lack of intent at the time the student engaged in the conduct,
 - A student’s disciplinary history, or
 - A disability that substantially impairs the student’s capacity to appreciate the wrongfulness of the student’s conduct.
- Exclusionary discipline only available in certain circumstances below Grade 3.

Tex. Educ. Code § 37.0019(a)



Federal Law Protections for Longer Removals



- Removal from class for more than 10 consecutive school days; OR
- Removals form a pattern (because they total 10+ days/ year, the behavior is substantially similar, and removals are close in time).
- Examples of Exclusionary Placements:
 - Suspension,
 - Disciplinary Alternative Education Program (DAEP),
 - Expulsion, or
 - In-school Suspension.*
- *In-School Suspension counts toward time of removal if student does not receive services specified by IEP, is not afforded opportunity to continue to appropriately progress in general curriculum, or does not receive same access to non disabled students.



Disciplinary Placement Over 10 Days



- School must:
 - Notify parent of disciplinary decision and give them a copy of their procedural safeguards on the same day the school decides to take the disciplinary action; and
 - Assemble parents and relevant ARD members for a manifestation determination review.



Manifestation Determination Review



- The ARD committee must decide if the student's conduct:
 - Was caused by, or had a direct and substantial relationship to the student's disability, OR
 - Was the direct result of the school's failure to implement the student's IEP.
- If yes: The student's conduct is a manifestation of the students disability and the school must:
 - Conduct a functional behavioral assessment (FBA),
 - Implement a behavior intervention plan (BIP), and
 - Return the student to his prior placement.
- EXCEPTION: Even if conduct was a manifestation, if the behavior involved drugs, weapons, or substantial bodily injury, the student can be placed in a DAEP for up to 45 days.



What is a Functional Behavioral Assessment?



- Evaluations used to develop positive behavioral supports and a BIP.
 - All behavior serves a function. An FBA attempts to determine what function a student's unacceptable behavior serves. It tries to determine what the student "gets" or "avoids" through the unacceptable behavior.
 - An FBA does not simply describe a behavior. It identifies the biological, social, affective, and environmental factors that initiate, sustain, or end the behavior in question.
- The BIP must include positive supports and interventions (these should be described in the FBA).



Education Services During Suspension or Expulsion



- A district may be required to provide FAPE during suspensions and expulsions.
- If the removal is less than 10 days, the school is only required to provide the same services it provides to non-disabled students.
- If the removal is for more than 10 days then the school must provide services.
 - The services provided don't have to be exactly the same services but the school must enable the child to continue to participate in the general curriculum.



Restraint/Seclusion

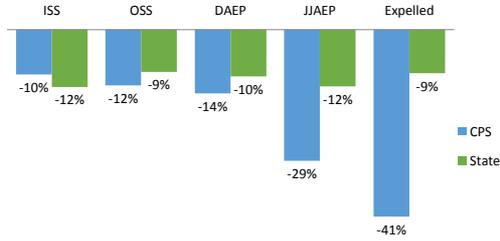


- **Seclusion: Banned**
 - Students may not be confined in a locked box, locked closet, or locked room that: (A) is designed solely to seclude a person; and (B) contains less than 50 square feet of space.
Tex. Educ. Code § 37.0021
- **Restraint: Restricted**
 - Only allowed in emergency situations, in which student's behavior poses a threat of: (A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction (meaning expensive property).
 - Notice Requirements.
 - Staff Training Requirements.

19 Tex. Admin. Code § 89.1053



Decline in Discipline Action per Student



WHAT CAN JUDGES DO?



- The most important thing YOU, JUDGE can do is:
 - Require that your CASA programs have thorough education training.
 - Authorize and encourage your attorneys at litem to help advocate.
- YOU, JUDGE:
 - Ensure participation in any Manifestation Determination Reviews.
 - Ensure that no child goes to 10 + school days without education services regardless of placement.
 - Ensure child receives transportation and FAPE in disciplinary placement.
- Remember, schools are required to send all incident reports to CPS and to a surrogate or foster parent.



#8

How Are Disputes Resolved?



TEA Complaint Process



- First step is to try to resolve problems with school districts by going to an ARD before complaining to TEA.
- If cannot resolve issue at ARD:
 - Write Letter of Complaint to TEA requesting investigation.
 - State the violations believed to have occurred.
 - State the facts on which complaint is based. Be specific.
 - Attach important documents (ARD Documents, evaluations, etc.).
 - Sign the complaint.
 - Mail complaint to:
 - Texas Education Agency
Division of IDEA Coordination
1701 North Congress Avenue
Austin, TX 78701-1494
- TEA has 60 days to determine if law has been broken.



Mediation



- Parents may request mediation whenever there is a complaint or disagreement about special education services.
- Mediation is free.
- To request mediation:
 - Write letter to TEA requesting mediation, and
 - Include name of school district, name and grade of student, contact information, and a short description of concerns.
- May mail or fax request to:
 - Texas Education Agency
Division of Legal Services
1701 North Congress Avenue
Austin, TX 78701-1494
Telephone: 512.463.9720 | Fax: 512.475.3662



Due Process Hearing



- A parent may request an impartial due process hearing as a last resort when they feel the school district has violated special education laws.
- Resembles a trial, but a lawyer is optional.
- Must request hearing within one year of the time they knew of the wrongful action (this is more strict than in some states).
- Parent must first attend "resolution session."
 - Held within 15 days from time district receives hearing request.
 - If no agreement is reached within 30 days of hearing request, due process hearing can occur.



Disability Rights Texas Can Help



- Discipline (Removal, school citations, positive behavior supports),
- Ending and preventing illegal seclusion or restraint,
- Inclusion,
- Transition Planning,
- Assistive Technology,
- Advice and Tech Support on other issues, and
- Appointment as attorney at litem or co-attorney ad litem.



WHAT CAN JUDGES DO?



- If a student receiving 504 or special education services is having behavior issues in school, YOU, JUDGE consider getting help from Disability Rights Texas.
- Make contact with them before you need them.
- YOU, JUDGE personally call them and assign them your case when you need help. They will not tell you no!

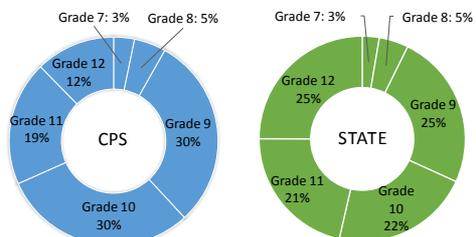


#9

How Are Students Prepared for Transitions?



Drop Out Leaver by Grade 2014-15



*Representative of highest grade level achieved when left school due to dropping out; CPS requires that all students remain enrolled in public school while in care unless GED or home school scenario.



What are Transition Services?



Child Welfare

- Program,
- Assists youth in DFPS conservatorship,
- Includes PAL supports, (e.g. life skills class, workforce readiness),
- To transition from foster care to independent living.

Special Education

- Coordinated set of activities,
- Based on the individual needs of a student with a disability,
- Focus on improving the academic and functional achievement,
- To facilitate movement from school to post-school activities.



Transition Plan



- Beginning not later than the first IEP to be in effect when the child turns 14 and then updated annually thereafter. The IEP must include:
 - Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment and independent living skills, where appropriate,
 - Transition services needed to assist the child in reaching those goals, including courses of study, and
 - Beginning not later than one year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights under this title, if any, that will transfer to him or her on reaching the age of majority.

20 U.S.C. § 1414(d)(1)(A)(i)(VIII)



Personal Graduation Plan



- Review of Personal Graduation Plan (PGP) required for some junior or middle school students and ALL high school students.

Tex. Educ. Code §§ 28.0212, 28.02121

- Helpful tool to keep students in foster care on track for graduation, especially when progress disrupted by school changes.



Dual Credit



- Each district must have a program to earn at least 12 hours of college credit in high school.
- May provide an opportunity to earn credit for course/activity, including apprenticeship or training hours:
 - Satisfy requirement to obtain industry-recognized credential or certificate or associate degree and is approved by the THECB; and
 - May earn credit concurrently toward high school diploma and post-secondary academic requirements.
- School district not required to pay tuition/associated costs.

Tex. Educ. Code § 28.009



Postsecondary Opportunities



- Tuition Fee Waiver
 - Qualifying students formerly in foster care exempt from payment of tuition and fees, including for dual credit courses, at Texas public institutions of higher education.
- Tex. Educ. Code §§ 54.366, 54.367
- Education Training Voucher
 - Under federal law, eligible youth entitled to up to \$5,000/year to cover education-related expenses.
- 42 U.S.C. § 677



WHAT CAN JUDGES DO?



- YOU, JUDGE treat the education of the children in your court as important as their permanency. ASFA does not rank any child's permanency higher than their well-being and you shouldn't either.
- When you are talking to the children in your court, ask about school but also talk about college.
- YOU, JUDGE tell every child you see every time that you see them that they can go to college for free and be a judge just like you.



#10

What Are We Doing to Collaborate?



Points of Contact



- Regional Education Specialists
 - https://www.dfps.state.tx.us/Child_Protection/State_Care/education_specialists.asp
- School District FC Liaison
 - <http://tea.texas.gov/FosterCareStudentSuccess/liaisons/>
- TEA FC Liaison
 - Kelly Kravitz - Kelly.Kravitz@tea.texas.gov
- Higher Education FC Liaisons
 - <http://www.collegeforalltexans.com/apps/financialaid/tofa2.cfm?ID=429>
- THECB Liaison
 - Natalie Coffey - natalie.coffey@thecb.state.tx.us



What Are We Doing to Improve Outcomes?



Additional Resources



- Children’s Commission Website, Foster Care & Education
 - <http://texaschildrenscommission.gov/our-work/foster-care-education/>
- Disability Rights Texas Website
 - www.disabilityrightstx.org
- Special Education Connection
 - <http://www.specialedconnection.com/>
- Texas Education Agency (TEA)
 - https://tea.texas.gov/Academics/Special_Student_Populations/Special_Education/Special_Education/
- Wright’s Law
 - www.wrightslaw.com



WHAT CAN JUDGES DO?



- YOU, JUDGE find and attend at least one regional education consortium meetings.
- YOU, JUDGE personally speak to your Regional Education Specialist and ask what local issues need to be solved.
- YOU, JUDGE make contact with a Higher Education Liaison at college near you.



Questions???



Thank you for addressing the educational needs and goals of children and youth in DFPS managing conservatorship!

